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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

CITY OF VERNON
Petitioner,
VS.
SOUTHERN CALIFORNIA EDISON COMPANY,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF THE PETITIONER

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PETITIONER'S REPLY BRIEF

Edison's responding brief answers neither of the two important questions presented by Vernon's petition, both of which are raised by the record and ripe for decision. Instead, Edison replies to its own questions and supplies answers that contradict the evidence that Vernon produced in opposition to summary judgment and the law of this Court followed by other circuits.

I.

EDISON HAS NOT AND CANNOT RECONCILE THE NINTH CIRCUIT'S BUSINESS JUSTIFICATION HOLDING WITH THE DECISIONS OF THIS COURT

Edison had tried to justify its anticompetitive conduct by arguing that it maintained low price levels for its customers. It argues that *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), rejecting a business justification defense based on maintaining price levels, applies only to maintaining high price levels; therefore the validity of its conduct is not affected by the decision.[1] The holding cannot be thus confined. The antitrust vice is using anticompetitive means to maintain prices at any level because such price maintenance tampers with price which is the " 'central nervous system of the economy.' " *Id.* at 692.[2]

Edison does not deny that it offered no evidence that its exclusionary conduct has any pro-competitive effects or produced any efficiency gains, as required by *Eastman Kodak Co. v. Image Technical Serv. Inc.*, ___ U.S. ___ [112 S.Ct. 2072] (1992) and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985).[3] According to Edison, it did not need to prove either requirement of *Eastman Kodak* and *Aspen Skiing* because

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[1]Edison's Responding Brief ("EB") at 21.

[2]*Cf. Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

[3]Edison does not even discuss *Aspen Skiing* on this point, citing the case only for the unexceptional principles that a monopolist has no general unqualified duty to assist its competitor and that a legitimate

Edison was using its transmission monopoly "in the most efficient way possible" for the benefit of its customers. (EB at 20.) In a remarkable rhetorical flourish, Edison describes Vernon's efforts to buy transmission from it as a confiscation of its property. *Ibid.* Arguing that monopoly is more efficient and better for its customers than competition is "nothing less than a frontal assault on the basic policy of the Sherman Act" (*National Society of Professional Engineers*, 438 U.S. at 695).[4]

Edison argues that *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) is distinguishable because "the electric utility defendant refused to supply wholesale power *and* refused to wheel any power to its wholesale customers, despite available transmission space on its lines." (EB at 20-21 [Edison's emphasis].) *Otter Tail* cannot be distinguished on those grounds. Edison always had available transmission space on its lines more than adequate to serve all of Edison's needs and those of the Resale Cities, including Vernon.[5] Nothing in *Otter Tail* suggests that a utility with a transmission monopoly is excused from its antitrust duty to share transmission fairly with municipal utilities simply because it is willing to sell its two different products — wholesale power and transmission — in a single package.[6] Instead, the *Otter Tail* Court approved an injunction requiring the utility to offer the municipalities transmission as well as wholesale power. The terms of the injunction would not have been explicable if the Court had decided that the utility would have fulfilled its antitrust duty by continuing to supply its two-product package to the municipalities

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justification excuses anticompetitive conduct, neither of which is in dispute here. EB at 18.

[4]Edison does not acknowledge that anticompetitive conduct is unreasonably exclusionary when it injures its competitors and their customers even if its own customers might temporarily enjoy some benefits from its conduct. *Aspen Skiing*, 472 U.S. at 605.

[5]*See* discussion *infra*, pp. 6-7.

[6]Wholesale power and transmission are different products; each is bought and sold separately. *Utah Power & Light Co.*, 45 FERC ¶ 61,095 at 61,284 (1986).

as captive customers.[7] The *Otter Tail* court also recognized that granting the requested relief did not impose any onerous supervisory burdens on the courts because the federal regulatory agency, like FERC today, was fully equipped to supervise the terms, conditions and rates for transmission access.

Relying on *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 649 (10th Cir. 1992), *petition for cert. filed* (June 25, 1992), Edison argues that its two-product package fulfilled its duty to share transmission fairly because its rates were regulated by FERC. (EB at 20.)[8] Rate regulation was not an excuse accepted in *Otter Tail*. Rate regulation is not a substitute for the antitrust laws, as Congress itself has made clear.[9] Antitrust laws, not rate regulation, are the congressional means of policing the competitive process.[10]

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[7]If an offer to sell wholesale power alone were enough to discharge Edison's duty to deal, then Edison had no duty to offer Vernon a reasonable integrated operations agreement ("IOA"), permitting Vernon to purchase power from some non-Edison suppliers. The Ninth Circuit concluded that Edison had that duty in addition to offering to sell Vernon power at wholesale, and Edison has ignored that holding which it did not seek to have reviewed. (App. at 11-12.)

[8]Even if *City of Chanute's* reasoning was correct on the facts of that case, it gives no comfort to Edison because the regulatory history and industry response in the natural gas industry differ sharply from that in the electric utility industry.

[9]Pet. at 23.

[10]Rate regulation is based on Edison's costs, not on its efficiency or its competitive conduct. Although rate regulators have refused to approve rate increases when the costs have not been justified, they do not impose efficiency standards or insist on competitive pricing. *E.g.*, CPUC disallowed more than $43 million in charges by Edison to its ratepayers because Edison purchased extravagantly expensive power from its own unregulated affiliate. O'Malley Decl., Ex. I, filed Sept. 17, 1990 (CR 298; ER 967).

"A rate may not be so unreasonably high as to warrant rejection, [by rate regulators], and yet be considerably higher than the rate the regulated company would be willing to accept under pressure of

Vernon is not complaining that it has "been the victim of any price-gouging by Edison." (EB at 20.) Its complaint is that Edison's exclusionary conduct has thwarted the competitive process from which Vernon has individually suffered antitrust injury. Its continued ability to buy transmission bundled with Edison's power does not cure the injury to the competitive process because it denies Vernon (and other Resale Cities) the opportunity to compete with it in buying wholesale power from others. If Edison were correct, it (and every other monopolistic electric utility) could indefinitely perpetuate and extend its monopoly in the relevant markets with antitrust impunity. This Court has never accepted that result.

Edison ignores *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389 (1978) and the circuit court opinions holding that a monopolist's anticompetitive conduct is not excused because its conduct might have benefited its own customers or constituents.[11] It also ignores *Aspen Skiing's* requiring that the effects of anticompetitive acts on all market participants and relevant consumers, not just on consumer-customers of the monopolist, must be considered in deciding whether the particular conduct was unreasonably exclusionary.

Edison cannot defend the Ninth Circuit's shifting the burden of proof to Vernon on the business justification defense to uphold the judgment on the ground that Vernon did not carry its burden of producing enough evidence to prove that Edison's justification was invalid. (EB at 21.) *Eastman Kodak, Aspen Skiing* and *NCAA v. Board of Regents of Univ. of Oklahoma*, 648 U.S. 85 (1984) imposed the burden of proving business justification on antitrust defendants in both Sections 1 and 2 cases. Contrary to Edison, no rational basis exists for relieving a monopolist of proving a valid business justification to excuse its behavior under Section 2 when the same monopolist doing the same acts would have the burden if it did not act alone (Section 1). This Court has not so held. The Ninth Circuit's impermissible shifting the

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competition." Turner, "The Scope of Antitrust and Other Economic Regulatory Policies," 82 *Harv. L. Rev.* 1207, 1235 (1969).

[11]Pet. at 18-19.

burden of proof to Vernon was highly prejudicial because, until that court did so, Vernon had no reason and no opportunity to produce all of its evidence on the invalidity of Edison's defense.[12]

II.

EDISON HAS NOT ERASED THE INTERCIRCUIT CONFLICTS

The Ninth Circuit decision is consistent only with its own opinion in *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (9th Cir. 1991), *cert. denied*, ___ U.S. ___ [18 L.Ed.2d 316] (1992) and, perhaps, with *City of Chanute*.[13] It is irreconcilable with the decisions of all the other circuits cited in the petition.[14]

Edison unsuccessfully attempts to distinguish *MCI Communications v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2nd Cir. 1990), *cert. denied*, ___ U.S. ___ [114 L.Ed.2d 125] (1991), and *City of Mishawaka v. American Elec. Power Co., Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1095 (1981). (EB 24-25.) Edison argues, without evidentiary support, that unlike those cases, (1) Edison was "fully utilizing" all of its lines for its other customers and, therefore, selling transmission to Vernon would have required it "to forego its own use of its facilities to the detriment of its customers" (EB at 24); (2) Vernon did not carry its burden of proving that its reasons for denying transmission

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[12]Nevertheless, Vernon *did* produce substantial evidence that Edison's exclusionary conduct was not motivated by concern for its ratepayers, but by anticompetitive animus. Pet. at pp. 4, 12.

[13]*Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539 (4th Cir. 1991), *cert. denied*, ___ U.S. ___ [116 L.Ed.2d 39 (1992)] is not in point because defendant had no antitrust obligation to change its basic business to accommodate the plaintiff. Transmission is a part of Edison's existing business.

The district court recognized that the circuits were in conflict on the point. RT at 16 (May 14, 1990).

[14]Pet. at 21-23.

were illegitimate and its conduct was reasonable (EB at 24-25); and (3) granting Vernon "relative share firm access" would have discriminated " 'in favor of wholesale customers against the retail customers.' " (EB at 25.) The record, including Vernon's evidence, was directly contrary to all three statements.

The first statement implies that all of Edison's lines were fully loaded to supply power to its native load customers. Edison has not and cannot challenge Vernon's showing that Edison does not mean that a line is fully loaded when it says that it is "fully utilized." In Edison's lexicon, a line is always fully utilized unless it is disconnected.[15] Edison did not and could not rebut Vernon's evidence that, at all relevant times, Edison had more than enough capacity to serve all of its native load customers and all of the Resale Cities (including Vernon) with more to spare and that it would not have to stop transmitting on any line to serve Vernon.[16] Edison failed to reveal to the lower courts the fact disclosed in the "*CPUC Merger Case*"[17] that it had 400 MW of excess transmission capacity which was more than twice enough to supply Vernon transmission without any impact on Edison's other customers. CPUC found that Edison's transmission restraints were anticompetitively motivated.[18] When that decision became final while this case was pending on appeal, Vernon promptly invoked collateral estoppel.[19] Edison has not and cannot deny that it conceded on appeal that selling Vernon reasonable transmission

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[15]Pet. at 3, n. 2.

[16]Pet. at 4, n. 4.

[17]122 PUR 4th 225 (1991), App. at 73 *et seq.*

[18]122 PUR 4th at 258, App. at 76, 78.

[19]App. at 79. Edison incorrectly states that Vernon did not properly submit the decision to the lower courts or timely invoke collateral estoppel. EB at 2, n. 1. The record establishes that Vernon presented the decision to the district court in its motion for reconsideration as soon as it came down, included a copy of the decision in its appendix filed in the Ninth Circuit, and invoked collateral estoppel with respect to it in its reply brief and its petition for rehearing.

would not have burdened its system.[20] In fact, Edison chose to forego transmission revenues to prevent Vernon's buying power from Edison's rival wholesale vendors.

Edison's second distinction falls because it rests on the erroneous legal premises that its exclusionary conduct was justified, that it had no duty to sell any transmission to Vernon and, even if it did, the transmission it permitted under the generic IOA adequately fulfilled that duty even though FERC invalidated its terms as unreasonable, and that proportional sharing (hypothesized in Vernon's damage study) was unreasonable as a matter of law. (EB at 24-25.)[21]

Edison's third reason is likewise incorrect. Vernon's attack is not on discriminatory rates, but on Edison's exclusion of "rivals on some basis other than efficiency" whereby Edison's conduct is deemed predatory. *Aspen Skiing Co.*, 472 U.S. at 605. The same predation principle was applied in *City of Mishawaka v. American Elec. Power Co, Inc.*, 616 F.2d 976, 981 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

Here, and throughout the rest of its brief, Edison persists in stating that Vernon's liability claim was based on proportional access (relative-size share). It was not. Vernon's claim was that Edison was obliged to sell it reasonable access on reasonable terms, as this Court required in *Otter Tail* and *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). Pro rata access was used only to compute the prices that Vernon would have paid for power if it had been permitted to compete with Edison and to compare those prices with the prices that Vernon actually paid. Edison implies that the Ninth Circuit was right in holding that reasonable access could not be measured by proportionate sharing; yet, it has not and cannot distinguish the authorities cited in

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[20]Pet. at 14.

[21]Contrary to Edison, *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), *cert. denied*, ___ U.S. ___ [114 L.Ed.2d 125] (1991) is directly on point. (EB at 24.) The only access that Edison permitted until SC-12 became effective in January, 1987 was on terms found unreasonable by FERC.

Vernon's petition accepting that measure as reasonable and its own use of the same concept.[22] Edison has thereby conceded the point.

Throughout its brief, Edison also seeks to convey the impression that its conduct was not anticompetitive because it has generously shared transmission. It did not.[23] Edison refused *any* transmission or capacity credits for non-Edison power until it finally offered the unreasonable generic IOA to settle pending antitrust claims against it; it refused to integrate Vernon's own power resources under an IOA until 1986. It has never sold any firm transmission on its import "EHV" lines that would permit Vernon to compete with it in buying power from its rival wholesale vendors. It has permitted *only* EHV transmission allowing Vernon to reach its *own* Mead/Hoover power for which entitlement Edison cannot compete. After SC-12 was implemented in January, 1987, Edison has sold Vernon short-term transmission on its intra-Basin network thereby permitting Vernon to buy power from vendors whose resources can be reached on that network. That limited access prevents Vernon from competing with Edison in the bulk power markets in the Pacific Northwest and those east of the Colorado River, as Vernon correctly stated in its petition.[24] Edison has admitted that short term access is inadequate to permit a municipality to engage in effective long-range planning.

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[22]Pet. at 26.

[23]Edison's suggestion that a formal demand would have moved it to supply reasonable access (EB at 9) was refuted by Vernon's evidence of repeated demands and refusals of any access. Edison conceded that the futility question was triable. Edison's Opp. Essential Facilities Mo. at 5.

[24]Edison's contrary statement (EB at 7) is contradicted by the indisputable facts in the record. Edison's sometimes willingness to provide interruptible transmission service (*Ibid.*) does not constitute reasonable sharing of transmission because, by definition, Edison can interrupt that transmission at any time — as it did, without justification, to destroy Vernon's rights under its contract with Nevada Power Company.

III.

VERNON'S DAMAGE STUDY WAS NOT FATALLY FLAWED

Unable to defend the Ninth Circuit's holding that pro rata sharing is unreasonable, Edison attempts to uphold the decision on the ground that the court correctly decided that the study was inadmissible for failure to disaggregate losses " 'caused by acts which were antitrust violations from those that were not.' " (EB at 16-17.) That court failed to point to any particular damages that it attributed to lawful rather than unlawful acts, other than its erroneous determination that Vernon was not entitled to pro rata access.[25] If any further segregation were to become necessary (which at the pre-trial stage is speculative), corrections could easily be made in the existing study.[26] The Ninth Circuit impermissibly deprived Vernon of the opportunity ever to try its damage case by imposing restrictions on pre-trial damage computations that are far more stringent than this Court has accepted to quantify damages in a case tried on the merits.[27]

In violation of settled summary judgment law, the Court here disregarded Vernon's evidence in opposition to summary judgment, as it did throughout its opinion.

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[25]Vernon was not required to segregate damages because summary judgment was affirmed on Vernon's Section 1 claim; the same conduct is actionable under Section 2 when Edison acted alone. Pet. at 25, n. 53.

[26]The Ninth Circuit's reliance on the Flanigan affidavit to support its conclusion that the damage study could not be corrected is contradicted by the affidavit itself. The affidavit said that damages for group boycott under Section 1 should not be separated from damages under Section 2 because to do so would have permitted Vernon to recover twice for the same anticompetitive acts of Edison. Vernon's Petition for Rehearing at 24-25.

[27]*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-25; *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931).

CONCLUSION

The issues here joined are of great importance to the electric utility industry as well as to Vernon. The resolution of the conflict in the Circuits has a direct and immediate bearing on the future development of that industry. If allowed to stand, it is a barrier to efforts of regulators and of industry participants to create a more efficient industry upon which the Nation depends, and it will exalt the parochial self-interest of a monopolist over the national policy of competition.

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Respectfully submitted,

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